United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL 74-1536

United States Court of Appeals

For the Second Circuit

RALPH FUCCI,

Plaintiff-Appellant,

against

KONINKLIJKE ROTTERDAMSCHE LLOYD, N.V.,

Defendant-Appellee and Third Party Plaintiff,

against

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX

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APPELLANT'S BRIEF

Statement

This is an appeal from a judgment dated March 4, 1974 dismissing the complaint of the plaintiff after a jury trial by Judge Richard H. Levet of the United States District Court for the Southern District of New York.

This is an action to recover damages for personal injuries sustained by plaintiff by reason of the unsafe and unseaworthy condition of defendant's vessel and by reason of the carelessness and negligence on the part of defendant shipowner. Plaintiff was a longshoreman employed by

third party defendant, Universal Terminal & Stevedoring Corp.

A complaint was filed in the Clerk's Office of the United States District Court for the Southern District of New York on August 26, 1971 and was duly served on the defendant. The defendant answered on October 8, 1971. The third party complaint against the stevedore was served and filed on February 2, 1972. Issue was joined and the case came on for trial on February 6, 7, 11, and 13, 1974, and the jury having rendered a verdict in favor of the defendant, the Court directed a dismissal of plaintiff's complaint with costs to the defendant.

Issues Presented on Appeal

1. Did the Court commit reversible error by refusing to charge the Safety & Health Regulations for Longshoring, Section 9.91 (c) (d).

2. Did the Court charge assumption of risk by the plaintiff.

3. Did the Court err in charging that if plaintiff's fellow employees created an unseaworthy condition the defendant may be held liable unless the conduct of the plaintiff's fellow longshoremen was the sole cause of the alleged accident.

4. Did the Court err in its charge on negligence by making it an essential element of plaintiff's claim of negligence to prove that defendant failed to warn plaintiff even though this issue was specifically withdrawn before the charge by plaintiff's counsel.

Stipulated Statement of Facts

Plaintiff longshoreman sued defendant shipowner for claimed injuries when plaintiff slipped on seeds on the steel deck in the hold of defendant's vessel, which seeds plaintiff claimed came from broken cargo bags. Plaintiff claimed he slipped and fell about 2:00 P.M. and that seeds had been on the deck ever since 8:30 A.M. Plaintiff claimed that other longshoremen had slipped in the morning and afternoon but that none of the others had fallen. Plaintiff testified during the February, 1974 trial that he slipped and fell while helping push a heavy draft before it began to rain. In a statement he signed in July, 1970, four days after his claimed accident, plaintiff said he slipped and fell on seeds while walking towards the hatch ladder after the longshoremen had been ordered to cease work because of heavy rain.

POINT I

The Court committed reversible eror by refusing to charge the Safety & Health Regulations for Longshoring, Section 9.91 (c) (d).

Defendant stipulates plaintiff submitted a tiny request to charge with regard to the Safety and Health Regulations for Longshoring and timely excepted to the Courts' refusal to charge sub part 1 of same entitled, "*General Working Conditions*"; Section 9.91 Housekeeping;

> (c) Slippery conditions shall be eliminated as they occur;
>
> (d) Loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area.

In the case of *Provenza* v. *American Export Lines*, 1964 AMC 2279, 324 App. 2d 660 cert. den., 376 U.S. 952 (cited in *Reid* v. *Quebec Paper Sales & Transport Co.*, 1965 AMC 112, 340 App. 2d 34 2 CA) the Surrogate Court stated that the standards set up in the Safety Regulations promulgated by the Secretary of Labor defined reasonably safe conditions and their violations renders the ship unseaworthy and that if said unseaworthiness was a proximate cause of plaintiff's injury, the shipowner was liable for damages to the plaintiff. The *Reid* case cited above held that the Safety Regulations set a standard of safety that bound the shipowner for their breach.

In *Venable A/S Forenede Dampskebsselskab*, 1968 AMC 1437, the Court stated that the plaintiff was entitled to have the Safety Regulations placed before the jury with instructions that the violation of same would render the ship unseaworthy and if said unseaworthiness was a proximate cause of plaintiff's injury the shipowner would be liable to the plaintiff.

Here if the jury had known that there was a specific regulation dealing with slippery conditions and debris and that violation of same would be a violation of Safety & Health standards and would be a competent cause of unseaworthiness and/or negligence, then they would have had without a question a breach of a standard of care promulgated by a government agency and would or could have found for the plaintiff.

Plaintiff was definitely entitled to have these regulations placed before the jury and the failure to advise the jury of these regulations constituted reversible error.

POINT II

The Court, by the manner in which it charged, charged assumption of risk.

Plaintiff, in his request to charge #10 specifically asked the Trial Court to charge that a longshoreman did not assume the risk of negligence of defendant shipowner or the unseaworthiness of the vessel. Assumption of risk is no defense in causes of action based on negligence as well as unseaworthiness and is not available to a defendant in a maritime case. See Requests to Charge Appendix page 4a.

The Trial Court instead charged JKDS page 35, line 24 and 25, Appendix page 46a "A longshoreman who goes aboard a vessel to perform his trade must exercise reasonable care in performing his duties aboard the vessel." Page 36, lines 2 to 13, "In exercising reasonable care for his own safety, a longshoreman is under a duty to make use of his own faculties and senses, to observe and avoid dangers and injuries to himself, and he must be presumed to know what the ordinary use of his faculties would make apparent to him. "If a longshoreman is injured in one of the normal hazards of his calling without there being any fault of anyone else, and the ship being seaworthy, he must bear the loss himself. In any event, he must bear the responsibility of exercising reasonable care and the defendant must exercise reasonable care for the safety of the Longshoreman."

When again asked to charge, the plaintiff did not assume the risk of defendant's negligence or unseaworthiness of defendant's vessel, the Court refused even though in other cases and in one in particular before this Court, the case of *Andres Losa* v. *KNSM*, bearing Appeal #73-2054, the

same judge gave this very charge not once but twice, once in his charge on negligence, page 216 of the Losa Appeal, lines 13-15 which state as follows: "However a longshoreman does not assume the risk arising in ail or in part from the negligence of the shipowner. And at page 219, lines 19 to 22, "on the other hand a longshoreman does not assume the risk of injury arising in all or any part from a shipowner's breach of duty as to the provisions of a seaworthy vessel".

It is respectfully submitted that the actual charge without a charge on non-assumption of risk amounted to charging assumption of which constitutes reversible error. This is especially so since the man in this case had to work for four or five hours where the actual condition that caused the injury was present on the deck and steel plates of said vessel.

POINT III

The charge that if plaintiff's fellow longshoremen created an unseaworthy condition then the defendant may be held liable unless the conduct of plaintiff's fellow longshoremen was the sole cause of the alleged action, constituted reversible error.

This charge, see jkds page 41, Appendix page 50a could only hopelessly have confused the jury. If an unseaworthy condition exists and it is a proximate cause of the accident, the law is well settled that it does not matter who created the condition or allowed the condition to continue or even if the shipowner knew or should have known of the condition. For an unseaworthy condition to exist the only thing that was necessary for plaintiff to prove is that the condition existed. It does not matter if

the longshoremen or anyone else were responsible for creating this condition once the condition arose.

Under this charge as given, the jury could feel that this accident was the fault of the longshoremen for failing to clean up the seeds on the deck which constituted an unseaworthy condition.

POINT IV

The Judge's Charge on negligence was completely erroneous in that he charged the jury that the plaintiff had to prove defendant failed to warn plaintiff even though there was no such claim raised by plaintiff and in fact this claim was expressly withdrawn prior to charge to the jury.

The Judge's charge, jkds 34, Appendix page 45a on negligence was as follows:

> "In order for the plaintiff here to establish negligence on the part of the ship, he must prove by a fair preponderance of the credible evidence, first, that there existed a hazardous condition with respect to the presence of seeds on the deck on board this vessel on July 10, 1970, at the spot concerned; second, that defendant had notice, either actual or constructive, of this allegedly unsafe condition prior to the plaintiff's accident; and third; that the defendant did not warn the plaintiff concerning this allegedly dangerous condition or take steps to correct it; and fourth, and this one of the important factors, that this unsafe condition, after you reach a conclusion that it was unsafe, if you do, was a proximate cause in whole or in part of the injuries sustained by the plaintiff".

This places the burden on the plaintiff of proving the failure to warn where it was not even an allegation in the case.

It also limits his claim for negligence to a failure to warn or to correct a condition when the real basis for negligence was an unsafe place to work.

Obviously this charge on negligence was not correct and constituted reversible error.

CONCLUSION

Wherefore, it is respectfully submitted that the verdict dismissing the complaint be set aside and a new trial granted.

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APPENDIX TO APPELLANT'S BRIEF

Plaintiff's Requests to Charge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

1. The doctrine of unseaworthiness has been long established and applied to Maritime cases of this type. It is the duty of the shipowner to furnish the longshoremen with a reasonably safe place to work and not to compel them to work in places that may be dangerous and likely to and actually cause injury. The seaworthiness doctrine is, in essence, that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage or cargo containers, must be reasonably fit for the purposes for which they are to be used. It is a liability without fault, and is an absolute duty imposed on the shipowner. *Seas Shipping* v. *Sieracki,* 328 U.S. 85; *Pope & Talbott, Inc.* v. *Hawn,* 346 U.S. 406 and *Gutierrez* v. *Waterman S.S. Corp.,* S.C. 374 U.S. 858, 1963 AMC 1649.

2. The doctrine of seaworthiness imposes liability on the shipowner without question as to who was at fault for the condition complained of and it is not necessary to prove prior notice, actual or constructive, of the unseaworthy condition. It is a nondelegable duty. Relinquishment of control over the vessel to an independent contractor, does not exonerate the owner from his absolute liability which continues even after control of the ship has been surrendered to stevedores. The showing by the shipowner that he was exercising due care and diligence, does not constitute a defense to a claim based on unseaworthi-

ness. The owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty to exercise reasonable care. *Seas Shipping* v. *Sieracki, supra; Pope & Talbott, Inc.* v. *Hawn, supra; Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 and *Torres* v. *Kastor*, 227 F. 2d 664.

3. Regardless of who may be in actual possession, operation or control of the vessel or any part thereof, liability for an unseaworthy condition is always on the shipowner. *Alaska S.S. Co., Inc.* v. *Petterson*, 346 U.S. 396, 1954 AMC 860; *Palazzola* v. *Pan Atlantic S.S. Corp.*, 211 F. 2d 277 and *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423.

4. Dangerous and uncertain conditions under foot on board ship constitutes unseaworthiness. Walking and working surfaces on board vessels are required to be reasonably safe for use. If, as in our case, oily seeds scatter on the walking and working surface making it slippery and hazardous, the shipowner should clean such substance from the walking and working area or see to it that it is done. *Shenker* v. *U.S.A.*, 1964 AMC 6, 322 F. 2d, 622 (2CA); *Mitchell* v. *Trawler Racer, Inc.*, 1960 AMC 1503, 362 U.S. 539 and *U.S.* v. *Harrison*, 245 F. 2d, 911.

5. If the spillage results from either leaking containers or containers which broke by reason of mishandling by stevedores, the ship is unseaworthy. In *Gutierrez* v. *Waterman S.S. Corp., supra*, defective bags of coffee beans were being discharged onto the pier and were allowed to spill on the pier. A longshoreman slipped thereon and was injured. The Court held that a cargo container that leaks is unseaworthy. When the shipowner accepts cargo in a faulty container or allows the container to become faulty,

he assumes responsibility for injury that may be caused to longshoremen.

6. "Beans belong inside their containers, *and anyone should know,* as the trial court found, *that serious injury may result if they get out of their containers and get under foot.*" (p. 1655 of AMC Report)

7. Furthermore, the shipowner can become liable even if the accident resulted solely from the manner in which longshoremen carry out their discharge operations or their negligence in unloading. *Alexander v. Bethlehem Steel Corp.*, 1967 AMC 2324, 382 F. 2d 963 and *Mascuilla* v. *U.S.*, 1967 AMC 1702, 387 U.S. 237.

8. The Supreme Court having held that anyone should known that if coffee beans (and in our case, oily seeds) get under foot, serious injury may result, the vessel was unseaworthy by reason of the unsafe place of work, as well as by reason of the unsafe and unseaworthy condition of the cargo, and/or the unsafe method of operation by the longshoremen causing the spillage of such oily seeds on the deck.

9. Furthermore, the Safety and Health Regulations for longshoring, Sec. 9.91(c) and (d) required that slippery conditions shall be eliminated as they occur and loose debris shall be collected as the work progresses. The standards set up in the Safety Regulations define reasonably safe conditions and their violation render the ship unseaworthy and the shipowner liable. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 1965 AMC 112, 340 F. 2d 34 2 CA and *Provenza* v. *American Export Lines*, 1964 AMC 2279, 324 F. 2d 660, 4th Circuit, cert. den. 376 U.S. 952

and *Venable* v. *A/S Forenede Dampskebsselskab*, 1968 AMC 1437, 4 CA.

10. If, as here, one is injured on board a vessel in navigable waters, his rights are governed by Maritime Law and comparative negligence applies, contributory negligence being considered in mitigation of damages only. A longshoreman does not assume the risk of negligence of defendant-shipowner, or the unseaworthiness of the vessel. Assumption of risk is no defense in causes of action based on negligence, as well as unseaworthiness, and is not available to a defendant in a Maritime case. *Pope & Talbott, Inc.* v. *Hawn, supra; Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625; *Polermo* v. *Luckenbach Steamship Company*, 355 U.S. 20 and *Klimaszewsk* v. *Pac-Atl S.S. Co.*, 246 F. 2d 875.

11. The defendant has the burden of proving contributory negligence on the part of the plaintiff. *Laguerra* v. *Brasileiro*, 124 F. 2d, 553; *Maccarone* v. *The A/S Inger*, 262 F. 2d 569.

12. In considering contributory negligence, it is required to judge plaintiff's conduct by traditional negligence standards of whether he exercised the care which a reasonably prudent man would have exercised under the circumstances. *Ktistakis* v. *United Cross Navigation Corp.*, 1963 AMC 1211, 316 F. 2d 869.

13. The plaintiff in our case was not contributorily negligent. He was in the hold working where his employer directed him to perform his work. He was in no sense obligated to protest against the method of operation which he had been instructed to follow and he had no duty to

anticipate another's negligence. *Simpson* v. *Royal Rotterdam Lloyd*, SD 1964 AMC 1171; *Baltwanz* v. *Isthmian Lines*, 1964 AMC 1480 and *Hauer* v. *Compania Anonia Venezolana*, 1964 AMC 1421.

In view of the foregoing, plaintiff should not be charged with any contributory negligence.

14. Recovery can be had against a shipowner for both unseaworthiness and negligence in the same action *Pope & Talbott, Inc.* v. *Hawn, supra.*

15. It is settled law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard its vessel, who are not members of the crew. The defendant had a duty to furnish the plaintiff, as a business visitor or invitee, with a reasonably safe place to work. This duty included the responsibility not to compel him to work in places that may be dangerous and likely to cause injury. This is a non-delegable duty. *Palazzola* v. *Pan Atlantic S.S. Co.*, 1954 AMC 766; *Amato* v. *U.S.A.*, 167 F. Supp. 929 and *Fodera* v. *Booth American Shipping Co.*, 159 F. 2d 795.

16. A shipowner is negligent if he knows of or should know of a dangerous condition which is reasonably likely to cause injury and does not exercise the care which a reasonably prudent man would have exercised under the circumstances. *Gutierrez* v. *Waterman S.S. Corp., supra* and *Simpson* v. *Royal Rotterdan Lloyd, supra.*

17. The duty of exercising reasonable care and diligence to provide such reasonably safe place to work devolves on the owner of a ship. For the breach of that

duty liability follows. The fact that there is a concurrent duty imposed on a contractor employer to furnish an employee with a safe place to work does not alter the owner's liability. *McFall* v. *Compagnie Maritime Belge*, 304 N.Y. 314.

18. Furthermore, if the shipowner knew or should have known of the violation of the Safety and Health Regulations for longshoring which occur on board i s vessel it would be liable to the plaintiff on the ground ot negligence. *Provenza* v. *American Export Lines, supra.*

19. The Maritime rules with respect to comparative negligence, assumption of risk and burden of proof of contributory negligence which is set forth in previous paragraphs of this brief applies to the cause of action and negligence as well.

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Defendant's Requests to Charge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

1. Plaintiff has the burden of proving every essential element of his case by a fair preponderance of the credible evidence. Jury Instructions and Forms for Federal Civil Cases [hereinafter cited as "Forms"], 28 F.R.D. 401, 415; Federal Jury Practice & Instructions [hereinafter cited as "FJPI"] §71.01.

2. Proof by a fair preponderance of the credible evidence means that the inferences which can reasonably be made from the believable evidence persuade you that the essential facts which plaintiff seeks to prove are more likely so than not so. Universe Tankships v. Pyrate Tank Cleaners, S.D.N.Y., 152 F. Supp. 903; "Forms", 28 F.R.D. 415; "FJPI" §71.01.

3. Plaintiff cannot satisfy that burden of proof merely by persuading you that he had an accident or was injured on defendant's ship. Mosley v. Cia Mar Adra, 2 Cir., 314 F. 2d 223; Kuberski v. N.Y. Central R.R., 2 Cir., 359 F. 2d 90; Palomino v. Winck, S.D.N.Y., 222 F. Supp. 985.

4. Any witness, including the plaintiff, may be discredited or impeached by contradictory evidence, or by evidence that at other times the witness has made statements or given testimony which are not consistent with the witness' present testimony. If you believe that any

witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If you believe that a witness knowingly testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. "Forms", 28 F.R.D. 424-425; "FJPI" §72.04.

5. Since plaintiff has an obvious financial interest in the outcome of his case, you may consider that fact in determining the weight and credibility to be given plaintiff's testimony. Westchester Fire Insurance Co. v. Tantalo, D. Conn., 273 F. Supp. 7, aff'd 337 F. 2d 280.

6. Credibility is determined by considering such factors as the witnesses' demeanor, interest, inherent probability, consistency, and corroboration or lack of corroboration by other credible evidence. Westchester Fire Ins. Co. v. Tantalo, D. Conn., 273 F. Supp. 7, aff'd 337 F. 2d 280; Iodice v. Calabrese, S.D.N.Y., 345 F. Supp. 248.

7. Your verdict must be based on common sense and reasonable beliefs and must be supported by the credible evidence and not by mere speculation. Miller v. Farrell Lines, 2 Cir., 247 F. 2d 503; Kuberski v. New York Central Railroad Co., 2 Cir., 359 F. 2d 90.

8. The rules of evidence ordinarily do not permit witnesses to testify to their opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses", such as a medical doctor. You should consider each expert opinion received in evidence in this

case, and give it such weight as you may think it deserves, but you are not bound to accept any such opinion and you may reject such opinion if you conclude that the reasons given in support of the opinion are unsound or are outweighed by other evidence or that the expert witness is otherwise unworthy of belief. Sartar v. Arkansas Gas Corp., 321 U.S. 620; Conn v. Young, 2 Cir., 267 F. 2d 725; "FJPI" §71.08.

9. To have evidentiary weight, an expert's opinion must be based upon proven facts; therefore, unless you find that all of the assumed facts upon which an expert opinion is based and which were essential to that opinion—that all of those assumed facts were proven to be true, you cannot properly accept or rely upon that expert opinion. Herman Schwabe, Inc. v. United Shoe Machinery Corp., 2 Cir., 297 F. 2d 906; Syracuse Broadcasting Corp. v. Newhouse, 2 Cir., 319 F. 2d 683; Rewis v. U.S. 5 Cir., 369 F. 2d 595.

10. In order to be seaworthy, a vessel must simply be reasonably fit for her intended purpose. Absolute perfection is not required. Mitchell v. Trawler, Inc., 362 U.S. 539.

11. The warranty of seaworthiness does not require that a longshoreman be furnished an accident-proof ship, nor does it make the shipowner an insurer of the longshoreman's safety. Mitchell v. Trawler Racer, Inc., 362 U.S. 539.

12. To satisfy the warranty of seaworthiness, a shipowner is not required to furnish the best possible ship, gear, or equipment but must simply furnish a ship, gear,

and equipment which is reasonably fit and suitable for its intended purpose. Italia Societa, etc. v. Oregon Stevedoring Co., 376 U.S. 315.

13. To be seaworthy, stowage of cargo need only be reasonably safe and convenient for carriage and discharge within the usual and customary standards of the industry. Nuzzo v. Rederi A/S Wallenco, etc., 2 Cir., 304 F. 2d 506.

14. A seaworthy vessel is not made unseaworthy by a temporarily unsafe condition if, despite such condition, the vessel remains as fit for service as similar vessels in similar service, and if the work area aboard the ship remains reasonably fit to permit persons to perform their work with reasonable safety. Pinto v. States Marine Cor., 2 Cir. 296 F. 2d 1.

15. Negligence is doing something which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do, activated by considerations which ordinarily regulate the conduct of human affairs. "Forms", 28 F.R.D. 494.

16. To recover for negligence, plaintiff must prove that defendant either actually noticed or reasonably should have noticed the claimed dangerous condition and should reasonably have foreseen the possibility that someone might thereby be injured. Poignant v. U.S., 2 Cir., 255 F. 2d 595; Gwinett v. Albatross S.S. Co., 2 Cir., 243 F. 2d 8; Petition of Kinsman Transit Co., 2 Cir., 338 F. 2d 708.

17. Absent evidence that anyone employed by defendant shipowner actually saw the claimed dangerous condition prior to plaintiff's accident, in order to recover for

negligence plaintiff must prove that the claimed dangerous condition was present for sufficient length of time prior to plaintiff's accident so that some responsible person in defendant's employ ought reasonably to have discovered and had the condition corrected. Guerrini v. United States, 2 Cir., 167 F. 2d; Poignant v. United States, 2 Cir., 225 F. 2d 595.

18. In determining what is reasonably foreseeable, you should endeavor to put yourselves in the same position as was the defendant on and prior to the date and time of plaintiff's claimed injury. In other words, you should use foresight as of that time and not hindsight as of today. Ismert-Hincke Milling Co. v. Union Pacific Railroad Co., 10 Cir., 238 F. 2d 14.

19. Reasonable foresight requires only that a person of ordinary prudence anticipate that harm might reasonably result from his act or inaction; failure to guard against the remote possibility of harm or harm which could not reasonably be foreseen in the exercise of ordinary care is not negligence. Berry v. Atlantic Coast Line Railroad Co., 4 Cir., 273 F. 2d 572; In re Reading's Petition, N.D.N.Y., 169 F. Supp. 165.

20. The shipowner had no duty to oversee, supervise, or direct the methods by which or manner in which the stevedoring corporation and its employees performed the stevedoring services. Cornec v. Baltimore & Ohio R.R. Co., *supra;* McGeeney v. Moran Towing Corp., *supra;* Berti v. Compagnie de Navigation Cyprien Fabre, 2 Cir., 258 F. 2d 734; Albanese v. Holland-America Lines, 2 Cir., 346 F. 2d 481, 392 F. 2d 763; Gallagher v. United States Lines Co., 2 Cir., 206 F. 2d 177; Puddu v. Royal Ned. S.S.

Co., 2 Cir., 303 F. 2d 752; Oblatore v. United States, 2 Cir., 289 F. 2d 400; Filipek v. Moore-McCormack Lines, 2 Cir., 258 F. 2d 734.

* * *

22. Defendant shipowner is not liable for the consequences of plaintiff's accident if it was caused solely by the negligence of plaintiff or other employees of the stevedore. Puddu v. Royal Ned S.S. Co., 2 Cir., 303 F. 2d 752; Guarracino v. Luckenbach S.S. Co., 2 Cir., 333 F. 2d 646; Pisano v. S.S. Benny Skou, S.D.N.Y., 222 F. Supp. 901, aff'd, 346 F. 2d 993; Spano v. N.V. Koninklijke Rotterdamsche Lloyd, 2 Cir., 472 F. 2d 33.

23. Defendant shipowner is not liable for the consequences of plaintiff's accident if it was caused solely by the operational negligence of employees of the stevedore. Usner v. Luckenbach Overseas Corp., 400 U.S. 562; Tarabocchia v. Zim Israel Navigation Co., 2 Cir., 446 F. 2d 1375; La Fleur v. M/S Maude, W.D. La., 349 F. Supp. 1318, aff'd 467 F. 2d 944.

24. Every worker, including longshoremen such as the plaintiff, assumes the ordinary risks of his occupation and if you find that the claimed accident resulted from the ordinary, usual risks of plaintiff's job, then you cannot award any damages to plaintiff against defendant. West v. United States, 361 U.S. 118; Lake v. Standard Fruit & Steamship Co., 2 Cir., 185 F. 2d 354; Klimaszewski v. Pacific-Atlantic Steamship Co., 3 Cir., 246 F. 2d 875; Rush v. Cargo Ships & Tankers, Inc., 2 Cir., 360 F. 2d 766; Jones v. Moore-McCormack, S.D.N.Y., 291 F. Supp. 888; Bryant v. National Tansport Co., 3 Cir., 467 F. 2d 139.

Defendant's Requests to Charge

25. In determining whether the accident to plaintiff resulted from the ordinary risks of his job, you make take into consideration the fact that the job of a longshoreman is inherently dangerous. Colantuono v. North German Lloyd, S.D.N.Y., 223 F. Supp. 381.

26. If plaintiff's own negligence played any part even the slightest, in proximately causing the claimed accident for which plaintiff seeks to recover damages, then you must find that plaintiff was contributorily negligent. Page v. St. Louis Southwestern Railway Co., 5 Cir., 349 F. 2d 820.

27. Every person, including the plaintiff, has a legal duty to make reasonable use of his own senses in order to avoid injury to himself, Walker v. Lykes Bros. S.S. Co., 2 Cir., 193 F. 2d 772, and failure to do so is contributory negligence as a matter of law. Stoffel v. N.Y., N.H. & H. R. Co., 2 Cir., 205 F. 2d 411.

28. Defendant had no obligation to warn the plaintiff about any dangerous condition without proof by the plaintiff that defendant knew or should have known of the existence of the condition in sufficient time to effectively warn the plaintiff. Martin v. United Fruit Company, 2 Cir., 272 F. 2d 347.

29. Defendant had no obligation to warn plaintiff of any dangers which plaintiff himself should have perceived and avoided. Long v. Silver Line, 2 Cir., 48 F. 2d 15; Trost v. American Hawaiian S.S. Co., 2 Cir., 324 F. 2d 225.

30. Defendant had no duty to warn plaintiff of any condition which was obvious upon a cursory inspection. Harris v. United States, W.D. Ky., 154 F. Supp. 46.

Defendant's Requests to Charge

31. Defendant had no duty to warn plaintiff of any risks or dangers where the very nature of the work which plaintiff was performing should have made him aware of such risks and dangers Brunengraber v. Firestone Tire & Rubber Company, S.D.N.Y., 214 F. Supp. 420.

32. Defendant had no duty to warn plaintiff of any hazard which plaintiff might reasonably be expected to notice himself. Trost v. American Hawaiian Steamship Company, 2 Cir., 324 F. 2d 225.

33. Should you find that the defendant was negligent or that the ship was unseaworthy, and that such negligence or unseaworthiness was a proximate cause of any injury or damage to the plaintiff, and further find that the plaintiff was guilty of some negligence which proximately contributed to his own injury or damage, then the total damages awarded to the plaintiff must be diminished or reduced by you in the same proportion that the amount of contributory negligence chargeable to the plaintiff compares with the amount of negligence or unseaworthiness chargeable to the defendant. "Forms", 28 F.R.D. 499-50.

34. Plaintiff has the burden of persuading you that the damages which he seeks to recover were proximately caused in whole or in part by defendant's negligence or by the unseaworthiness of defendant s ship. Ramos v. Matson Navigation Co., 9 Cir., 316 F. 2d 128; Olivares v. United States Lines, Co., 2 Cir., 318 F. 2d 890; Blier v. United States Lines Co., 2 Cir., 286 F. 2d 920; "FJPI" §78.09.

35. Mere proof of negligence or unseaworthiness does not constitute or sustain plaintiff's burden of proving

proximate causation. In re Marine Sulphur Queen, 2 Cir., 460 F. 2d 89.

36. Proof of proximately caused damages requires plaintiff to prove that a chain of events flowed from defendant's claimed negligence or the ship's claimed unseaworthiness and led to the damages which plaintiff seeks to recover; a chain of events unbroken by any other event for which defendant is not liable. Mosley v. Cia Mar Adra, 2 Cir., 314 F. 2d 223; in short, that the claimed negligence or claimed unseaworthiness in fact caused the claimed injury and claimed damages. In re Marine Sulphur Queen, 2 Cir., 460 F. 2d 89.

37. Plaintiff cannot recover damages from defendant for any physical condition, disability, or consequential damages which were not proximately caused by any negligence of the defendant or any unseaworthiness of the ship. Evans v. S. J. Grobes & Sons, 2 Cir., 315 F. 2d 335; Akers v. Norfolk & Western Ry. Co., 4 Cir., 417 F. 2d 632; "Forms", 28 F.R.D. 446.

38. Any award of damages must be reasonable. If you find that plaintiff sustained any damages which were proximately caused by any negligence of the defendant or any unseaworthiness of the ship, your verdict may award plaintiff only such damages as will fairly and reasonably compensate him for the injuries and consequential damages which you find, from a preponderance of all the credible evidence in the case, he has sustained as a proximate result of any such negligence or any such unseaworthiness. You are not permitted to award speculative damages. This means that you are not to include in verdict any

amount for any loss which, although possible, is wholly remote or conjectural. "Forms", 28 F.R.D. 446; "FJPI" §78.08.

39. Of course, the fact that I instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to prevail in the case. Instructions as to the measure of damages are given for your guidance in the event you find from the evidence in favor of a party entitled to recover damages. "Forms", 28 F.R.D. 450.

40. Plaintiff must prove the amount of his recoverable damages with reasonably certainty. W. L. Harley & Co. v. County of Niagara, 2 Cir., 388 F. 2d 746.

41. To recover future damages, there must be substantial evidence to support a reasonable estimate. Alexandervich v. Gallagher Bros. S. & G. Corp., 2 Cir., 298 F. 2d 918.

42. Any award for future lost income should be based on plaintiff's work-life expectancy, Robillard v. A. L. Burbank & Co., S.D.N.Y., 186 F. Supp. 193, which because of the physical nature of the work of a longshoreman you can reasonably conclude would usually not exceed 65 years of age. Cunningham v. Rederiet Vindeggen, 2 Cir., 333 F. 2d 208; Conte v. Flota Mercante del Estado, 2 Cir., 277 F. 2d 664; Puggioni v. Luckenbach Steamship Company, 2 Cir., 286 F. 2d 340; Yodice v. K.N.S.M., 2 Cir., 443 F. 2d 76.

43. Every person, plaintiff included, has a legal obligation to mitigate his damages by making reasonable efforts

to work. Robillard v. A. L. Burbank & Co., S.D.N.Y., 186 F. Supp. 193.

44. The nature and extent of the injuries which proximately result from an accident may not be proved by evidence of statements as to aches, or pains, or injuries made to a doctor by a patient, in connection with the doctor's obsrvation, examination, or treatment. Such statements, when received in evidence, are received only for the purpose of enabling the doctor to tell you everything upon which he may have based any opinion expressed as to the patient's physical or mental condition. The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms, revealed through observation, examination, tests, or treatment; or the opinion may be based entirely upon subjective symptoms, revealed only through statements made by the patient; or the opinion may be based in part upon objective symptoms, and in part upon subjective symptoms. To the extent that any opinion testified to by a doctor is based upon subjective symptoms described to him by a patient, the jury may of course consider the accuracy of the patient's statements, in determining the weight to be given the doctor's opinion. "FJPI" §71.09.

45. Your verdict must represent the considered judgement of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of

your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case. "Forms", 28 F.R.D. 451.

Dated: New York, New York
February 4, 1974

Respetfully submitted,

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Transcript of Proceedings, February 7, 11, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

HON. RICHARD H. LEVET,
District Judge

New York, February 7, 11, 1974

(jkds 1)

The Court: Now I will first rule on the defendant's requests to charge.

Mr. Kimball: If your Honor please, I don't know whether your Clerk——

The Court: Plaintiff's, rather.

Mr. Kimball: —whether your Clerk mentioned it to you, but counsel did not anticipate that your Honor would rule in detail on requests, and we make no demand upon you in that respect.

The Court: All right. If you do, then you withdraw the requests. If you want to do that. I can't do otherwise. Either we have some and I rule on them or we don't. I can't do otherwise.

Mr. Lassoff: I don't withdraw the requests, your Honor.

The Court: Well, I will state the rulings on the plaintiff's.

Do you want to withdraw yours, Mr. Kimball? Otherwise I shall rule on them.

Mr. Kimball: I can't, your Honor.

Colloquy

The Court: All right, I will rule on them.

Mr. Kimball: I do withdraw some of them, however, because, for example——

The Court: Well, take your paper and cross out

(jkds 2)

the ones you want to withdraw.

Mr. Kimball: And I would like to tell you the reasons why I am withdrawing them when my time comes because it bears upon your Honor's charge. In other words, for a particular example, I withdraw all requests pertaining to warning because Mr. Lassoff tells me, as I am sure he will assure your Honor in a moment, that there is no claim here that the defendant was negligent for failing to warn the plaintiff. So that is not in the case.

The Court: Is that so, Mr. Lassoff?

Mr. Lassoff: Yes.

The Court: All right. Now, let me take the plaintiff's and then we will proceed.

Plaintiff's No. 1—have you your copy of that, a copy, Mr. Kimball?

Mr. Kimball: Yes, but mine aren't numbered in any way, your Honor.

The Court: Well, they should have been numbered, and we had to number them.

Mr. Kimball: All right, we will follow along.

The Court: Somebody—maybe Mr. Lassoff—better number them. Please don't omit that little thing. It takes the Court's time and adversary's time.

Mr. Lassoff: I'm sorry, your Honor.

(jkds 3)

The Court: Mr. Lassoff, take Mr. Kimball's copy and yours and put numbers on them, will you?

Colloquy

Mr. Kimball: I assume your Honor has simply numbered consecutively each paragraph. I am sure I can follow along. Thank you.

The Court: All right. No. 1 is granted as charged.

2 is granted as charged.

3 is granted as charged.

4, the same, granted as charged.

5 is refused.

6 is refused.

7 is refused except as charged.

8 is refused.

9 is refused.

10 is refused except as charged.

11 is granted.

12 is granted as charged.

13 is refused.

14 is granted as charged.

15 is refused except as charged.

16 refused except as charged.

17 refused except as charged.

18 refused.

And 19 is refused except as charged.

(jkds 4)

Mr. Lassoff, are there any exceptions on those rulings?

Mr. Lassoff: Yes, your Honor.

The Court: Well, state them.

Mr. Lassoff: I except—I am going by my copy, and I have to sort of tell you——

The Court: Well, I will assume that yours are numbered the same as mine.

Mr. Lassoff: Mine aren't numbered, but I think I am at where you are.

Colloquy

The Court: If there is any doubt about it, take this and number yours.

Mr. Lassoff: I think that is probably better.

I except to your Honor's refusal to charge paragraph 5, 6——

The Court: Well, here, somebody gave me plaintiff's copy. I don't want the copy. I want the original back when you are through with it.

Mr. Lassoff: All right. I am trying to look at it.

The Court: Go ahead and look at it. Please get your tools ready.

[Pause]

The Court: Any exceptions, Mr. Lassoff?

(jkds 5)

Mr. Lassoff: Yes, your Honor. I except to your Honor's refusal to charge paragraph 5, 6, 7, except as charged—I may withdraw the objection after I hear the charge, of course—and in particular paragraph 9 which deals with the safety and health regulations for longshoring.

The Court: I know what they deal with. You don't need to tell me.

Mr. Lassoff: I specifically object——

The Court: I have got the numbers on mine.

Mr. Lassoff: I specifically except to your Honor's denial to charge those regulations.

The Court: Well, they haven't been submitted.

Mr. Lassoff: May I ask your Honor to take judicial notice of those regulations?

The Court: Rather late, counselor. I haven't a copy of them.

Mr. Lassoff: I can supply your Honor with a copy of them immediately.

Colloquy

The Court: Why don't you get ready when you come into court?

Mr. Lassoff: I object to your Honor's refusal to charge 13.

The Court: Yes.

Mr. Lassoff: 15, 16.

(jkds 6)

The Court: That was refused except——

Mr. Lassoff: Except as charged. 17——

The Court: Refused except——

Mr. Lassoff: And 18, except as charged.

The Court: 19? Don't overlook anything.

Mr. Lassoff: 19, your Honor, I also object to unless—is that refused or except as charged?

The Court: Refused except as charged.

Mr. Lassoff: All right, your Honor.

The Court: Now, Mr. Kimball, do you want to record on the record any exceptions as to my rulings on the plaintiff's?

Mr. Kimball: No, your Honor, but I would like to bolster one of your rulings.

Quite apart from the fact——

The Court: Wait a minute, you want to do what?

Mr. Kimball: To bolster one of your rulings.

The Court: Which one is this?

Mr. Kimball: This is your ruling on these safety and health regulations for longshoring, and it seems to me that we have been over this ground before your Honor before, and that it has been pointed out to the Court that specifically the regulations are inapplicable to ship owners.

The Court: I don't know, you see.

Colloquy

(jkds 7)

Mr. Kimball: And that they disclaim any intent to impose any additional burden on ship owners, and that as a result of that, our Second Circuit, in the Albanese Case, at 346 Fed. 2nd, specifically page 484, has held that the longshore regulations are inapplicable to ship owners, and although the Albanese Case was reversed by the United States Supreme Court on other grounds, there is dictum in the Supreme Court opinion 382 U.S. at page 284, which supports the Second Circuit ruling that these longshore regulations are inapplicable to ship owners.

Accordingly, your Honor, qutie apart from the fact that the record does not contain any reference to these regulations, nor was any request made during the trial that your Honor——

The Court: They do now.

Mr. Kimball: —that your Honor judicially notice them, your ruling is correct under the authorities cited.

The Court: Have you remarked your papers, Mr. Kimball?

Mr. Kimball: I withdrew request——

The Court: Mark them on that.

Mr. Kimball: They are marked with red pencil. Numbers 28 thru 32 are withdrawn.

The Court: I'd better not hold you now. I will

(jkds 8)

give you the determinations Monday morning at 10:30.

Now, this special verdict, of course, was altered by certain things we did, and I shall look it over again, but if there is any suggestion for alterations based upon it as it stands, please advise me.

The directions will have to be changed somewhat.

Colloquy

Mr. Lassoff: If your Honor recollects, after we finished picking the jury, all of us were agreed that we had no mental giants on this jury, and this is by far the most complicated set of instructions of a special verdict that either Mr. Kimball or myself have seen in a long time. I think these——

The Court: They are long. So is your trial virtually because it included both liability and damages, and my own humble opinion is that the jury, without a special verdict, would flutter all over the place.

Mr. Lassoff: I am not objecting to a special verdict, your Honor. I am suggesting that possibly the special verdict can be simplified because——

The Court: Well, would you suggest how I can simplify it?

Mr. Lassoff: I think Mr. Kimball and I might have some ideas along that line.

The Court: Well, you mention yours. Don't rely

(jkds 9)

on your adversary.

Mr. Lassoff: Well, for example, with No. 7, "Has plaintiff proved by a fair preponderance of the credible evidence that as a result of the accident of July 10, 1970, he sustained damages consisting of past pain, suffering and disability"——

The Court: That is merely a subdivision of the alleged claims, counsel.

Mr. Lassoff: Yes.

The Court: Don't they have to decide that to get to a verdict? Maybe you'd suggest that they just pool all of the claims and come up with some guestimate.

Mr. Lassoff: Well, what I was suggesting in simplifying it, instead of having it [a] and [b], "And if he has, what award?"

Colloquy

The Court: What's that?

Mr. Lassoff: You have 7 divided into 7[a] and [b].

The Court: What's wrong with that? They have to decide whether there are any; then they have to decide what it amounts to, don't they?

Mr. Lassoff: All right, your Honor.

The Court: I think you are unnecessarily worried. It will probably take this jury perhaps—I don't know, maybe I underestimate them—it may take them longer than

(jkds 10)

some juries take, but it seems to me that this will aid rather than hinder them.

Mr. Lassoff: Your Honor will probably charge them with regard to what the word "mitigate" means?

The Court: Oh, surely. There will be a paragraph or so about that.

Mr. Lassoff: With regard to mitigation of damages by taking on other employment, the only evidence in this case as to the possibility of other employment goes with Dr. Michele's report dated October——

The Court: Does that make any difference, if it is only one of your own doctors?

Mr. Lassoff: This is a defendant's doctor. I subponaed him. This is Universal's doctor, not mine. He was paid by Universal. He treated on behalf——

The Court: Wait a minute. You called him. I don't know whose doctor you're talking about. Certainly it wasn't the ship's doctor.

Mr. Lassoff: It was Universal's doctor. He was here under subpoena.

The Court: So what? That doesn't mean it was the ship's doctor. You are talking, I think, in unreasonable terms.

Colloquy

Mr. Lassoff: All right, your Honor.

(jkds 11)

The Court: Do you have any suggestions, Mr. Kimball?

Mr. Kimball: A few. I do agree that it would be possible to shorten this form and desirably so in the following specific respects:

Turning to interrogatory No. 5, since we have stipulated that the fair and reasonable——

The Court: All right, I will state that you stipulated, and I will take that out.

Mr. Kimball: That way there won't be any possibility of the jury finding something——

The Court: They will come down with the thing to the last dollar, of course, if there is liability.

Mr. Kimball: In other words, there would be——

The Court: I will take out 5.

Mr. Kimball: Put the stipulated amount in there some way and you can probably dispense with [b].

The Court: I will charge it. They are good at remembering numbers and dollars.

Mr. Kimball: On interrogatory No. 8, subdivision [b], while ideally desirable, I think it is practically unnecessary, and I would simply substitute——

The Court: We can just say how much.

Mr. Kimball: How much.

The Court: I will take it.

(jkds 12)

Mr. Kimball: Similarly on the mitigation, how much should he have mitigated it.

The Court: What is that number?

Mr. Kimball: I have renumbered mine because of the omission.

Colloquy

The Court: Don't do it until I renumber mine.

Mr. Kimball: Right. We will be completely messed up here.

The Court: I will put that in and I will put this in in the No. 8.

Mr. Kimball: This is your 9, Judge, the way they are numbered now. I think you can cut some of those subdivisions if you wish to do so, without damage to the thing. There was one other place here——

The Court: All right. We will go over it carefully.

Mr Kimball: 10 is necesary, I think, as you have drawn it because of the reservation which you have made on the question of the effect of the guarantee.

The Court: Yes, of course.

Mr. Kimball: What time does your Honor want to see counsel on Monday?

The Court: 10:30. That is all I would like to do today.

(jkds 13)

All right.

Mr. Heidel: On Monday morning I would like to put some motions on, and they are very simple, and won't take more than a minute. I don't think it is necessary to waste time now.

The Court: All right. Thank you. I appreciate counsel's efforts to shorten the time of this trial.

I haven't asked you about your time on summations. I will ask Mr. Lassoff first.

Mr. Lassoff: About an hour.

The Court: An hour? Oh, no, we won't get through Monday if you take that time.

Mr. Lassoff: If we are going to go into mitigation of damages, your Honor, that requires much more talking on my part.

Colloquy

The Court: You will have to go into everything relevant but see if you can't cut it to something less than an hour.

Mr. Lasoff: I am usually shorter, not longer.

The Court: Try to make it no more than 40 minutes.

Mr. Kimball: I will try to make mine no more than 30 minutes, your Honor.

The Court: And yours, Mr. Heidel?

Mr. Heidel: I would say no more than 20 minutes,

(jkds 13A)

your Honor.

The Court: You will be first, Mr. Kimball and Mr. Lassoff last, unless you agree to some other change.

Mr. Lassoff: All right, your Honor.

The Court: Very well. Thank you and good night.

[Adjournment taken until Monday, February 11, 1974 at 10:30 a.m.]

(jkds 14)

New York, New York
February 11, 1974—10:35 a.m.

[Trial resumed]

[Jury not present]

The Court: I will rule on the defendant's requests:

1. granted as charged.
2. granted as charged.
3. granted as charged.
4. granted as charged.
5. granted as charged.
6. granted as charged.
7. granted as charged.
8. granted as charged.

9. refused except as charged.
10. granted.
11. granted.
12. granted.

(jkds 15)

13. refused except as charged.
14. granted as charged.
15. granted.
16. granted as charged.
17. refused except as charged.
18. refused except as charged.
19. refused except as charged.
20. granted as charged.

I believe 21 was omitted.

22. granted as charged
23. granted as charged.
24. refused except as charged.
25. refused.
26. granted as charged.
27. granted as charged.

28 thru 32 withdrawn.

33. granted as charged.
34. granted as charged.
35. granted as charged.

36 thru 41 all granted as charged.

42. granted as charged.
43. granted.
44. refused except as charged.
45. granted except as charged.

(jkds 16)

Any exceptions, Mr. Kimball?

Colloquy

Mr. Kimball: None, your Honor.
The Court: Mr. Lassoff?
Mr. Lassoff: Give me a moment, your Honor.

[Pause]

Mr. Lassoff: Your Honor, I specifically except to your Honor's charging 22 of defendants requests of charge in that I have already cited cases in my brief, in my requests of charge, that says even if the negligence was 100% of other employees of the stevedore, if this created a condition or if the consequences of the acts were so apparent and obvious over a period of time to the defendant, then this would still—failure to correct the condition would still bind the defendant in negligence, and the testimony in this case——

The Court: This 22 is granted as charged.
Mr. Lassoff: I know that.
The Court: Anything else?
Mr. Lassoff: I got that far, your Honor.

I further except to 23, your Honor, in that there is no testimony as to any operational negligence on the part of anybody in this case. The only testimony is that these men were working in the hatch on seeds.

The Court: Well, there is a question about it,

(jkds 17)

at least.

Do you have any, Mr. Heidel?

Mr. Heidel: No, your Honor.

Mr. Lassoff: Of course, I also reserve my exceptions to the "granted as charged", your Honor, since I don't know for now——

The Court: Very well. Look at the special verdict which I have attempted to simplify.

[Pause]

Mr. Lassoff: Might I suggest a correction in 1 and 2?

The Court: Which one?

Mr. Lassoff: 1 and 2, your Honor, which deal with negligence and unseaworthiness in any respect due to the presence of seeds on the deck of the SS Musi Lloyd. We don't claim there were any seeds on the deck. We claim there were seeds on steel plates in the hold. Now, the deck may be misleading.

The Court: It should be the deck of the hold, of course.

Mr. Lassoff: Yes.

The Court: What deck was it?

Mr. Lassoff: Well, seeds in the hold. It doesn't matter. There is some question whether it was the upper

(jkds 18)

'tween deck or the lower 'tween deck, but it is in the hold, not on the deck.

The Court: You want to say in the hold?

Mr. Lassoff: Right.

The Court: Well, it might be anywhere on that basis.

Mr. Lassoff: It has to be the cause of the accident, anyway, no matter where it is; they have to find that he slipped on it.

Mr. Kimball: Your Honor, I think the objection taken by Mr. Lassoff, with all deference, is pedantic. I think the deck in nautical parlance is the part that people walk on regardless of whether it has steel plates, wooden hatch boards or what else.

The Court: I will leave it and I will explain that it refers to the deck of the hold where the accident is alleged to have occurred.

Colloquy

Mr. Kimball: I note, your Honor, I think I note one inadvertant omission.

The Court: What is it?

Mr. Kimball: I didn't see any mention made in here of medical expenses which your Honor may recall we have stipulated.

The Court: I will state that there is a stipula-

(jkds 19)

tion on that, that is all.

Mr. Kimball: We have stipulated those in the amount of $6,521.05 but, of course, we haven't stipulated that they were proximately caused by any negligence or any unseaworthiness. But they are an item of damage which, if the jury gets that far, I would respectfully suggest they should be a consideration.

The Court: I think it can be added on No. 8.

Mr. Kimball: I think you could to it with ease.

The Court: All right. Mr. Clerk, add it on and have the last page done over, please.

All right, that's it then.

Mr. Heidel: Your Honor, I believe on Friday you gave me permission until this morning to make certain motions for the purpose of the record.

The Court: All right, what motions do you want to make?

Mr. Heidel: I would move to dismiss the claim of negligence on behalf of the vessel because there is no proof of notice in this case, your Honor.

The Court: What do you say to that, Mr. Lassoff?

Mr. Lassoff: Well, the testimony, your Honor, is that the plaintiff first saw these seeds on the deck at 9:00 o'clock in the morning. The accident happened at

Colloquy

(jkds 20)

2:00 p.m. That is five hours, which certainly is constructive notice of condition.

The Court: I will leave it as a question and deny the motion.

Any other motion?

May I, for the purpose of the record, move for judgment, your Honor, on the record, at the close of the entire case?

The Court: What is your motion now?

Mr. Heidel: I am moving for judgment, your Honor, on the entire case.

The Court: Directed verdict, you mean.

Mr. Heidel: Yes, directed verdict. I beg your pardon.

The Court: Reserved.

Mr. Lassoff: May I make a motion?

The Court: You have a motion?

Mr. Lassoff: Yes.

Mr. Heidel: I have a motion.

The Court: Mr. Heidel, will you finish up, please.

Mr. Heidel: Now, your Honor, I believe that under the testimony that we have in this case I should be entitled to make a motion to strike any consideration for future loss of wages in view of the testimony that the plaintiff is

(jkds 21)

able to return to work as a longshoreman provided he does not work as a hold man. He can work on the stringpiece. He can work driving a Hi-Lo. He can lift items. All he cannot do is climb ladders.

The Court: That may be, but there may be a diminution in his earnings. I shall have to deny that motion.

Mr. Heidel: All right, your Honor. Thank you. That is all I have.

Mr. Lassoff: Does your Honor want the safety and health regulations?

The Court: I don't want it.

Mr. Lassoff: I thought your Honor had taken judicial notice of these Thursday.

The Court: I didn't say I would. What do they have to do with this?

Mr. Lassoff: Well, specifically they say slippery conditions shall be eliminated as they occur, and the cases that I have cited to your Honor in my requests of charge——

The Court: Who says that? Who is supposed to eliminate? Is this for the stevedores and the longshoremen or is it for the ship?

Mr. Lassoff: The cases say, your Honor, while this controls——

The Court: I mean the regulations that you talk

(jkds 22)

about.

Mr. Lassoff: These are for the employer, your Honor. However, the cases that I cite——

The Court: Well, that's not——

Mr. Lassoff: —say this is a standard of care applicable to the ship owner, and I am entitled to a charge on that basis as some evidence of a standard of care.

The Court: What do you say, Mr. Heidel?

Mr. Heidel: My understanding was, your Honor, that these applied to longshoremen and stevedores as opposed to the ship owner. This case is against the ship owner at this juncture.

The Court: Mr. Kimball?

Mr. Kimball: I believe that is the law in the Second

Circuit, your Honor, under the Albanese Case, which I think I cited on Thursday, and I thought we were by this point. I thought your Honor had indicated——

The Court: I will reject it.

Now I think we are ready for summations. The order, of course, in reverse; Mr. Heidel, Mr. Kimball and then Mr. Lassoff.

Get the jury.

You have a very important question, here I think, as to whether seeds are a hazardous condition. There is no

(jkds 23)

indication as to what kind of seeds they were, actually.

Mr Lassoff: The testimony says they were like seeds on bread, your Honor, little black seeds on bread.

The Court: Well, there can be all sorts of seeds on bread.

Mr. Lassoff: The testimony is it was slippery, the men slid and slipped all day.

The Court: As I say, it is rather flimsy.

[Jury present]

The Court: Now, members of the jury, after certain legal matters have been disposed of, we are ready for the summations.

Now, a word about summations. The order of summations is directly opposite to that of the opening statements. We will hear first from Mr. Heidel, second from Mr. Kimball and lastly from Mr. Lassoff. The reason for that is that the burden of proof is upon the the plaintiff. These summations are statements by the lawyers as to what they believe the proof is or what it is not, de-

pending on the viewpoint and as to what is an appropriate determination. This part of the case is a section in which the statements of the lawyers, as I have said before, are not evidence. They are merely arguments. They must be based entirely on the evidence and nothing that is not in evidence can be

(jkds 24)

adverted to.

First, then, I call upon Mr. Heidel for the stevedore.

(Mr. Heidel made a closing statement)

(Mr. Kimball made a closing statement)

(Mr. Lassoff made a closing statement)

The Court: Now it is after half past 12:00, and it is too late to begin a charge. Consequently I will excuse the members of the jury and recess the court until a quarter of 2:00. Please continue to heed my instructions.

(Luncheon adjournment taken until 1:45 p.m.)

(jkds 25)

AFTERNOON SESSION—1:55 p.m.

(In the robing room)

The Court: Just before lunch Mr. Kimball, I was told, in the presence of the other two counsel, gave my Clerk a copy of the special verdict which had certain insertions in question 4, 6 and 7, and I have taken the liberty of inserting or having them inserted into the original Court's Exhibit No. 1 which is the controlling exhibit. I take it

there is no objection to that. And I have also put in something in No. 8 which reads: "Has plaintiff proved by a fair preponderance of the credible evidence that as a proximate result of the accident of July 10, 1970, he sustained damages consisting of past medical expenses? Yes or no.

"To what award, if any, is the plaintiff entitled?"

And I shall state the stipulation, so I think that is covered.

Now I am troubled by something——

Mr. Kimball: May I simply inquire on the subject whether or not your Honor had intended to read these questions to the jury or not?

(jkds 26)

The Court: No, I will do this: I will have the Clerk distribute the master question to the foreman. I will have copies distributed to the others and I may comment on this, and I shall tell them about these additions.

All right, now I am concerned about this problem of so-called guaranteed income.

I assumed, and I have reread the stipulation which was transcribed by our reporter, and it was my impression that this factor was not to be mentioned or considered by the jury. Mr. Lassoff said something about it, and my proposed solution is that I should, I believe, tell them that they may disregard the amounts, if any, paid for guaranteed income.

This stipulation, I believe, will cover the application to both past wages and future wages.

Any objection to that?

Mr. Lassoff: Yes, your Honor.

Colloquy

The Court: What do you want to do, counselor? You have just mixed this whole thing up and now you don't want to help solve it. Now, what do you want to do? Do you stand by the stipulation? I shall have to compel you to do so, counselor.

Mr. Lassoff: I made no stipulation, your Honor.

The Court: What's that?

(jkds 27)

Mr. Lassoff: I made a stipulation that you could adjust the verdict to diminish it by the amount of the guarantee from July 10th of 1970 till September 30 of 1971. I specifically said if Mr. Kimball stipulated that there is a guaranteed wage in effect, that fixes the earnings of longshoremen as a minimum, and that is all I commented on, the minimum wage of a longshoreman who is ready, willing and able to go to work.

Mr. Kimball: I think there is no necessity, particularly at this late hour and on the eve of your Honor's charge, to get very upset about it. Your Honor said that it is your intention to tell the jury that they may—m-a-y—disregard it. Even absent that stipulation, which I consider, I believe, in the same light as the Court, but even without the stipulation, that instruction to the jury would be entirely appropriate and therefore I respectfully request that your Honor charge just that, not that the jury must disregard it or that they shall disregard it, but that they may disregard it, and I cannot imagine that there could be any legitimate objection to that, even without the stipulation.

The Court: Do you agree with that, Mr. Heidel?

Colloquy

Mr. Heidel: Well, I do to this extent, your Honor, that my understanding was just what the Court has expressed.

(jkds 28)

I think that Mr. Kimball's request to the Court in terms of the charge is entirely appropriate. I think that in all candor Mr. Lassoff's commentary to the jury was inappropriate, but I think it can be cured if your Honor handles this matter in the way suggested by Mr. Kimball.

The Court: That is the way I shall do it.

We will proceed.

Mr. Lassoff: Your Honor, may I raise one question? You said on 8 that you would tell the jury to put the amount in. In that event, why submit "To what award, if any?" If they do find it, then your Honor could add the award.

The Court: Because it must be proximately caused by the accident, that is all. That is the only——

Mr. Lassoff: All right.

The Court: I will explain.

[In open court; jury present]

Charge of the Court

(jkds 29)

The Court: Mr. Foreman and ladies and gentlemen of the jury:

You are now about to enter upon your final functions as jurors, and that is to decide the facts in this case.

You, of course, are the sole and the exclusive judges of the facts. You pass upon the weight of the evidence, the credibility of the witnesses, and you determine the reasonable inferences to be drawn from such conflicting evidence as there may be in this case.

It is my duty at this time to instruct you as to the law and it is your duty to accept these instructions as to the law and to apply them to the facts as found by you in the course of your deliberations.

In your determination of the facts you rely solely upon your own recollection of the evidence. What I have said from time to time or what I may say in this charge or what counsel may have said during the course of the trial or during the summations is not to be taken by you in place of your own recollection of the facts.

No comments by counsel or by Court are evidence. You are to draw no inference from them.

During the course of this trial I have been forced to pass upon questions concerning the admissibility

(jkds 30)

of evidence. As I stated to you, I think, in the beginning, your duty is to decide the evidence. My duty, in part, is to decide what evidence may go before you.

You are to draw no inferences from the Court's rulings in respect to the admission or the rejection of evidence. These rulings relate solely to basically questions of law and they are not to concern you as the triers of the facts.

Neither are you to be concerned by questions asked by the Court nor that the Court asked questions. These questions were asked solely to elicit or clarify facts at issue. Nothing that the Court said is to be construed to indicate what your determinations should be except, of course, that I expect you to following these instructions.

You must completely ignore answers by witnesses made either voluntarily or in response to a question where such answers have been stricken. Then they form no part of the evidence in the case and they may not be considered by you in determining your verdict.

The statements made by the attorneys in the summations are, of course, not facts or evidence. The evidence, as I think I stated in the beginning, must come from the testimony of witnesses on the stand, from exhibits offered and marked into evidence, and possibly from some

(jkds 31)

depositions or parts of depositions which are read into evidence.

Now, it is, of course, fundamental that you are to approach your duties here cooly and calmly, without emotion.

Both direct and cross-examination should be considered by you.

You may draw certain inferences from testimony, but you are not permitted to draw inferences from other inferences.

No verdict is to be based upon speculation or conjecture.

We begin with the basic principle that the plaintiff here, having made this claim, has the burden of proving the material allegations of his complaint by a fair preponderance of the credible evidence.

Now, this term "fair preponderance of the credible evidence" means the greater weight of the evidence. It

refers to the quality of the evidence. It means that the testimony on the part of the party on whom the burden rests must have more convincing weight than anything opposed to it.

You may say that a fact was proved by a fair preponderance of the evidence when all of the credible evidence, the believable evidence, tends to persuade you to believe

(akds 32)

what this witness or witnesses have said against other testimony that may have come into the case.

If you find that this credible evidence is evenly divided, then you must find on that particular point against the party who has the burden of proof.

Here, as I have stated to you, the burden is on the plaintiff.

If, in this case, after considering all the evidence that is, both direct examination and cross-examination, you find that it preponderates in favor of the plaintiff, then he has sustained the burden of proving his case by the fair preponderance of the evidence.

If the credible evidence is evenly divided, then the plaintiff has failed to sustain his burden and, of course, if the evidence is in favor of the defendant, then the plaintiff has also failed to sustain his burden and he cannot recover.

Now I charge you that the defendant has no obligation to come forward with any evidence. The burden is on the plaintiff to sustain his claim by whatever evidence he submits. Whether the plaintiff does or not, the fact remains that the defendant is entitled to a verdict in its favor if the plaintiff fails to sustain his burden of proof, that is,

to support his claims by a fair preponderance of the credible

(jkds 33)

evidence.

Now, I charge you in the beginning that the mere fact that an accident occurred does not entitle a plaintiff to a verdict against this defendant. Liability follows not from the injury or from the happening of an accident but from the breach of some duty owed by this defendant to this plaintiff.

The plaintiff in this case contends that on July 10, 1970, he sustained an accident because of the unseaworthiness of the defendant's vessel or, in the alternative, because of the defendant's negligence. Specifically, he contends that while employed on this day by the stevedore as a longshoreman aboard the vessel the defendant furnished him with an improper deck to work on in that there were seeds on it, and the deck referred to is the one on which he says he was injured.

The defendant, on the other hand, denies that it was in any way negligent. It denies also that the ship was in any way unseaworthy. Furthermore, the defendant contends that if plaintiff sustained an injury, it was due solely to the plaintiff's own negligence, better known as contributory negligence.

Now here, of course, the defendant is a corporation. Obviously a corporation can act only through its agents or

(jkds 34)

employees and so forth. Consequently, any act or omission by an agent or employee, if it is done within the

natural scope of his employment, is the act of the corporation.

Now I first speak of the claim of negligence. There are two fundamental claims, as you have heard. One is negligence and the other is unseaworthiness.

In order for the plaintiff here to establish negligence on the part of the ship, he must prove by a fair preponderance of the credible evidence, first, that there existed a hazardous condition with respect to the presence of seeds on the deck on board this vessel on July 10, 1970, at the spot concerned; second, that the defendant had notice, either actual or constructive, of this allegedly unsafe condition prior to the plaintiff's accident; and third, that the defendant did not warn the plaintiff concerning this allegedly dangerous condition or take steps to correct it; and fourth—and this is one of the important factors—that this unsafe condition, after you reach a conclusion that it was unsafe, if you do, was a proximate cause in whole or in part of the injuries sustained by the plaintiff.

The term "notice" may be either actual or constructive. Actual notice means that the defendant or its agents factually knew of the alleged unsafe condition, and you don't get to this point until you have first decided that

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it was an unsafe condition.

The term "constructive notice" means that the allegedly unsafe condition existed for sufficient time prior to the happening of the accident and was in such a place that the defendant should have known about it.

Negligence, in its simple terms, is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent

person would do under all of the circumstances of a given case. It is the failure to use ordinary and reasonable care under a given set of circumstances.

Under this doctrine, a ship owner is liable for negligence when the owner knowingly or carelessly breaches any duty, however slight, to the plaintiff.

Among these duties is the duty to furnish him, that is, in this instance, the longshoreman, with a reasonably safe place in which to work and perform his duties.

The defendant shipping company obviously is not an insurer of the safety of a longshoreman. It is not obligated to furnish the plaintiff with an accident-proof ship.

The standard here is the exercise of reasonable or due care under normai circumstances. A longshoreman who goes aboard a vessel to perform his trade must exercise

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reasonable care in performing his duties abord the vessel.

In exercising reasonable care for his own safety, a longshoreman is under a duty to make use of his own faculties and senses, to observe and avoid dangers and injuries to himself, and he must be presumed to know what the ordinary use of his faculties would make apparent to him.

If a longshoreman is injured in one of the normal hazards of his calling without there being any fault of anyone else, and the ship being seaworthy, he must bear the loss himself. In any event, he must bear the responsibility of exercising reasonable care, and the defendant must exercise reasonable care for the safety of the longshoreman.

Proximate cause. What is proximate cause? You will recall that I just stated a moment ago that it must be shown by a fair preponderance of the credible evidence

that any hazardous condition existing on the vessel, where this longshoreman was working, must be shown to be the proximate cause of the accident of which he complains.

Now, an injury or damage is proximately caused by an act or failure to act whenever it appears from the preponderance of the credible evidence in the case that the act or omission to act played any part, no matter how small, in bringing about or actually causing the injury alleged.

If the plaintiff here was injured solely by the

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negligence of his fellow longshoremen or by their employer rather than by the negligence of the defendant, the ship or its employees, then the plaintiff cannot hold the ship responsible.

I come to the subject of contributory negligence. The defendant has raised this defense in the pleadings, this defense of contributory negligence. It applies both to the claim of the plaintiff of negligence of the ship and unseaworthiness of the vessel.

To sustain this defense, the defendant has the burden of proving that the plaintiff's injuries were brought about by reason of his own negligence. That does not mean that the defendant is bound to call witnesses. He may extract the facts relative to contributory negligence from the plaintiff's witnesses, but the defendant does have this burden.

Now, what is contributory negligence? Contributory negligence is the doing of some act or omission by the plaintiff amounting to a want of ordinary due care for his own safety. It is negligence on the part of the person injured which, cooperating in some degree with the negli-

gence of another that is present, helps in proximately causing the injury.

The defendant's allegation that the plaintiff

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was contributorily negligent, however, does not bar recovery, but is does mean that if established it is a factor to be considered by way of a percentage in mitigation or diminution of any damages to which plaintiff might be entitled, should you determine that he is entitled to a recovery. You come to the factor of contributory negligence only if you have concluded, one, that the defendant was liable, based upon an alleged hazardous condition and a conclusion that it was hazardous, and a further conclusion, if it is so, that that was the proximate cause of the injury. Then this question is necessarily before you.

One of the attorneys here, the counsel for the stevedore, said that he believed that there was no contributory negligence. I won't comment on the position which he takes, but his position is not determinative here. The facts must determine it. You must decide it on the basis of the facts relative to this question of contributory negligence.

This action, as I have told you, is an action solely by the plaintiff longshoreman, an employee, it is true, of this stevedore, against the ship, and no other issue, no other issue whatsoever is before you.

Now I come to the second basis of claim, and that is so-called unseaworthiness. The same factors of the burden

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of proof, causal factors apply to this as they do to the negligence area.

This concept of seaworthiness in personal injury matters contemplates that the ship's gear, appliances and so forth

will be reasonably fit for their intended purposes. This standard, however, is not perfection. It is reasonable fitness for the intended service.

Seaworthiness in these personal injury matters does not necessarily mean that the defective condition be of such quality as to render the entire vessel unfit for the purposes for which it is intended, but it does mean that the defective condition of the vessel which proximately causes the longshoreman's injury makes the ship, the vessel, unseaworthy as to him, if that has been shown.

The ship owner's duty is to furnish a seaworthy vessel, and it arises out of a relationship of the ship owner and those who come abord the vessel to perform their services, some of which were formerly rendered by the crew and some of which are now done by the longshoremen.

A ship owner's liability for failure to furnish a seaworthy vessel is a species of liability without fault. It is not limited by concepts of negligence. The ship owner's actual or constructive knowledge of this alleged unseaworthy condition, if this condition existed, is not essential, and

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the fact that it may have been temporary or transient is also immaterial. The duty of the ship owner is to maintain a seaworthy vessel, and it exists regardless of the ship owner's fault.

If an unseaworthy condition is present, which is a proximate cause of the injury, then the exercise of due dilifence or reasonable care does not relieve the ship owner.

The injury, as I have stated, must be the proximate and foreseeable consequence of any unseaworthiness alleged.

Charge of the Court

A ship owner is not obliged to furnish a longshoreman with the best, most modern and most convenient appliances and machinery. The standard of a ship's seaworthiness is not that of perfection. It is not that of the best possible equipment. The equipment must be reasonably fitted for the use for which it is intended and, as I stated before with respect to the cause based on negligence, the ship owner is not obliged to furnish, under this doctrine of unseaworthiness, an accident-proof ship.

While this duty is absolute, it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.

Furthermore, even if you should find that an unseaworthiness condition existed and it was permitted to continue by the plaintiff's fellow workmen or by the act

(jkds 41)

of a longshoreman's superior, you may find—you may find; you don't have to—you may find the defendant liable, provided, of course, that you find present all the other elements of unseaworthiness, namely, a hazardous condition, a proximate cause of the accident and injury, as I have charged you.

In reference to unseaworthiness, if the conduct of the plaintiff's fellow longshoremen creates an unseaworthy condition, then the defendant may be held liable unless the conduct of the fellow longshoremen was the sole cause of the alleged accident. And as I think I stated awhile back, please remember that if you conclude that there is unseaworthiness—and I express no opinion on that—you will also recall that this defense of contributory negligence, if the same exists, is equally applicable to both unseaworthiness and to the claim of negligence, and if you find that it has been shown by the defendant or by the

testimony elicited by the defendant or by the testimony, in fact, which may have come from the plaintiff, if you find that, then you may deduct a percentage, and you are called upon in the special verdict, if you find contributory negligence to be proved in the manner in which I have stated, to deduct a percentage as already indicated.

Either factor is sufficient, as I have stated,

(jkds 42)

namely, negligence or unseaworthiness, but in both instances, the basic rule with respect to the burden of proof, causal relationship and all the other factors as I have charged you is likewise present.

Now I come to the division of this charge in respect to damages, and let me say this: Just as I charged you with respect to liability, I charge you with respect to damages, that these same principlies of the burden of proof, the proof by a fair preponderance of the credible evidence, all apply with equal force to damages as they did to the basic liability itself.

Here there are certain claims: Past lost wages, future lost wages; past pain, suffering and disability, future pain, suffering and disability. And there is a claim for medical expenses that has been stipulated, that the amount is $6325, if you agree, of course, prior to that, that there is liability, and if you further agree that these medical expenses were as a result of the accident, that is, if the causal connection is present.

First I will say a few words about past lost wages. Obviously here, in order to come to any sensible, accurate conclusion, you must decide for what period was the plaintiff unable to work between the time of the accident and the presnt date. That is what past means, up to the present

(jkds 43)

time, from the date of the accident. And, of course, you must conclude that it has been shown by a fair preponderance of the credible evidence that the injuries which are concerned were caused by the accident, and that these injuries were the cause of the loss of the work and the loss of the wages, and unless that is so, th[illegible] allowance should not be made.

Now I charge you at this point, which I assume is as appropriate as any, with respect to the doctrine of mitigation of damages, and that is roughly this: In assessing damages for past lost wages, you must—and, in fact, for any claim for future lost wages—you must take into consideration that every person who sues to recover damages which he claims were caused by another has a legal duty to keep all those damages to a reasonable minimum. This is known in law as mitigation of damages.

The burden of showing that plaintiff could have reduced or mitigated his damages in any given way is upon the defendant. This, however, does not alter the fact that the plaintiff must carry the burden in the first instance of proving his damages by a fair preponderance of the credible evidence and, as I have attempted to say, basically —and this is applicable to all claims of damages—the plaintiff must establish the nature, the extent, the effects of the damages he claims to have suffered.

(jkds 44)

Insofar as the proof with respect to the necessity of mitigation is concerned, you may consider the answers of the plaintiff. You may consider the answers under cross-examination and any other factors, including the testimony of the physicians with respect to the ability of the plaintiff to work.

Now I shall touch upon that later under the heading of facts.

Future lost wages. This has the same basic requirements. However, as to any future lost wages, the plaintiff must show that such prospective loss of wages is reasonably probable, which is a different standard than something in the past, and the burden, as I told you, is on the plaintiff.

Any testimony which the plaintiff may give is of little if any value since he is not qualified to state his future inability to work because of the accident. No plaintiff can say, "I can't work in 1970" or anything of that sort. He is not competent to do that, and hence you must go for this factor to the testimony, if any, and there probably was some with respect to the medical testimony.

Furthermore, it is agreed that the work life of a longshoreman under normal conditions is 65. That is based on the tables. However, you are not bound by the tables of either life expectancy or work expectancy. It may be

(jkds 45)

that prior accidents or the health conditions of a given plaintiff might make it so that he could not work to 65, so if you should get into the field of future lost wages, then you must decide how long a time up to 65 it would have been likely that the plaintiff could have worked.

I believe he is now 48 years of age.

And you must consider in connection with this subject of future lost wages all of the testimony with respect to what work he could do and could have done.

There is also a claim here for past pain, suffering and disability. You may consider the testimony of the plaintiff. You may consider the testimony, if it is directed to this area, by either one or both of these physicians. Pain

and suffering, at least generally, is solely a subjective item; that is, it is something about which the plaintiff speaks and which may in certain instances not be observable by a physician. If you find that any medical testimony or hospital records indicate any proof with respect to this question you may also consider in each instance whether or not the observation which brought the fact of the plaintiff's complaints about was creditable and whether or not the subjective statements of the plaintiff were true.

You may also consider whether or not any medical expert testified that the particular condition of plaintiff

(jkds 46)

resulting from the accident was a competent producing cause of pain or whether there was no such testimony.

Now, as I said, the proof of pain in the future must be based upon reasonably suitable testimony, that the future condition is reasonably probable to occur, not merely possible.

And you may consider particularly the medical testimony about the future.

In any event, the burden is on the plaintiff to prove that the future condition is reasonably probable.

If you find from the evidence that any of the plaintiff's injuries are permanent in nature, you make allowance for that permanency in your verdict to such an extent as you think circumstances warrant.

In this connection you would be entitled to take into consideration the period of time that has elapsed from the date of the accident, July 10, 1970, to the present date, and in connection with future time as to the evidence of pain and suffering, the time that the plaintiff is expected to live. He is now 48. His life expectancy, not the work

expectancy, the life expectancy is about 24 years. However, this, again, is a figure which is composed from the mortality tables, and it may or may not apply to this individual plaintiff.

(jkds 47)

You may consider, in connection with his possible life expectancy, the facts in reference to his health, his prior injuries and the suitable age to which he has lived or would have lived within the period in question or a figure less than that, that is, less than the formal figure.

Now, the fact that I mention life expectancy does not mean that I tell you that the plaintiff is necessarily entitled to an allowance for future pain, suffering and disability.

Now, with these general instructions as to the applicable law I pass to a consideration of some of the facts in this case. Please bear in mind, however, that this is only my recollection and it is not to be taken in place of your own recollection. It is your duty to consider all of the testimony by all of the witnesses, both direct testimony and cross-examination, and it is your duty to base your verdict only upon the facts which you decide, pursuant to these instructions.

I may advert to certain testimony and may not refer to other testimony, but you are to draw no conclusions because of that.

Now, I mention the plaintiff's case. Plaintiff here, Ralph Fucci, testified, in substance, as follows:

He has been a longshoreman for approximately

(jkds 48)

28 years. On July 10, 1970, through a hiring hall, he shaped up, as they say, and was assigned to work for this

stevedore, Universal, at Pier 6, Brooklyn, Bush Terminal, on the defendant's ship, beginning at about 8:50 a.m., under one Ralph Pane, a gang boss.

He was working in the No. 1 hold. He said that when he came aboard and went down to the hold he saw on the deck of that hold some bags of seed. He saw seed on the floor. He said in the shelter deck.

On his deposition before trial in 1972 he said it was in the 'tween deck or the between deck.

These longshoremen, 8 or 10 or so there, were loading general cargo which was being placed aboard on the vessel by means of a winch, boom and so forth, and going to lunch between 12:00 and 1:00.

The plaintiff said he slipped at about 2:00 p.m. on some of the seeds on the deck and fell on his left knee, when he was pushing a big box of general cargo, freight, or whatever it was.

However, soon thereafter he walked up the ladder, down the gangplank and walked to the timekeeper's office on the pier, reported the incident.

This was not a report, of course, to the ship. It was a report to his own employer.

(jkds 49)

Later, after the rain ceased, the hatch was again opened. He went down to the hold. But he could not remember whether he did or did not do any work.

Then he retraced his steps up the ladder, and so on. No one else slipped on the job that day.

The next morning he was sent to a hospital where the knee was X-rayed. He told about his pains and disabilities.

He gave you a history of his visits to various physicians and mentioned the operation which was prescribed by Dr. Michele on September 29, '72.

He subsequently received some physiotherapy.

He put forward various W-2 slips, Exhibits 1, 2 and 3. The third is a statement of the rates of pay on different dates or different years.

A month after the operation he indicated that the pain in his left knee lessened but was not eliminated.

He told you, as we have heard, about the polio in his right leg before the accident.

As I have already related, he declared that no other longshoreman had fallen.

The type of seed was not stated.

Except for a three hour period when he returned to work for his employer, he has not worked since the accident,

(jkds 50)

and he conceded that he had not tried to work or had not sought any other work.

Some years ago he drove a truck for a florist for a year. He now drives his own car.

He said he could not remember how many days per week his employment covered before the accident.

He said, as I recall it, that he had been injured some 15 or 18 times before; that he may have injured his left knee. I believe there were two accidents before.

Dr. Graubard, whose qualifications you heard, testified he first examined the plaintiff on July 20, 1970. He found tenderness in the left knee, limitations on flexion. You heard his diagnosis. He concluded that the plaintiff was temporarily totally disabled.

He subsequently examined the plaintiff on September 22, '70, November 2, '70, January 15, '71, August 31, '71 and January 21, '74. His examinations in each case were

approximately the same, with the same result, except that there seems to have been some definite improvement as time went on.

The hospitalization date, as you will recall, was between September 28, '72 and October 21, '72.

Dr. Michele described the operation. Basically it was the removal of the meniscus, and it appears that there

(jkds 51)

was some trouble which brought about this chond. omalacia situation.

In response to a hypothetical question addressed to Dr. Graubard, he gave it as his opinion that the torn cartilage was caused by the accident of which the plaintiff complained. However, in his opinion, Dr. Graubard stated that he could do other work than longshoremen's work; he could run a car; I believe he said he could work on the pier. He said that on his examination November 2, 1970, the plaintiff was hesitant about any surgery which apparently the doctor had recommended.

The authorization by the Labor Department, however, was apparently not granted.

Due to the situations to the right knee and leg coming from a prior case of paralysis, he could not make a valid estimate of the measurements of the left and right knees that might be compared, and could not, consequently, determine whether there was any atrophy in the left leg.

Now, the plaintiff makes no claim for hospital and medical expenses except the stipulation for the $6325 which I have mentioned.

I may also tell you at this time that you may disregard any reference to this income from guaranteed sources.

Now, then, the last witness for the plaintiff was .

(jkds 52)

Arthur Michele, orthopedic surgeon. He examined the records from some of the other doctors, Dr. Graubard, Dr. Kennedy, Dr. Post and one or two other physicians.

He examined the plaintiff for the first time on August 10, 1972. He diagnosed the plaintiff as having a torn horizontal meniscus and an injured patella with this situation which has been referred to as resulting from the grating of the unexposed bones against each other.

As I recall it, however, he said that this pained only with extended uses of the knee for a considerable period.

On September 29th, after he entered the hospital, he performed this operation, and which he described. He said it was a successful operation, that the normal time for recovery was two to three weeks. There were some incidental postoperative conditions, but none of them were abnormal and none were caused by the accident. He stated that this operation was a common one.

On December 7, '72, he examined the plaintiff again, February 14, '73 again. This time February 14, '73, the plaintiff told him that he had fallen on the left knee in January '73. Other occasions were March 1st, '73, May 17, '73, August 9th and October 3, 1973.

In the latter period of these examinations he commented that the plaintiff was improving. He said there

(jkds 53)

is some osteitis resulting from the rubbing of the bones after the knee operation, and he stated that, among other things, the plaintiff could do any sedentary work.

A hypothetical question addressed to Dr. Michele stated that the accident of July 10, 1970 was a competent produc-

ing cause of the conditions which he found and necessitated the operation.

After the operation, Dr. Michele stated plaintiff could not do the work of a longshoreman if it involved walking up and down ladders or up and down steps, but he could do work of a longshoreman ashore.

And you will recall that he stated that the delay in the operation was the cause of the continuance of pain.

You will also recall that he discussed the effects of the osteitis of the right leg and indicated that to some extent it affected the use of the left.

In March 1973 he noted that plaintiff was progressing satisfactorily and, again, that he was capable of working on the stringpiece, that is, on the pier, or driving a car, driving a Hi-Lo machine if the pedal was operable by the right leg.

In some prior knee injury the plaintiff had been unable to work for 16 or 17 weeks.

You have various exhibits which you may look at;

(jkds 54)

you may call for all of the exhibits or for particular exhibits.

And so, to briefly summarize this situation—you make your own summary; I am merely suggesting this as factors to be considered—plaintiff claims that there were seeds on the floor and that they constituted a hazard; that he fell on them this one time, although he had not fallen on any of the seeds during the entire morning; that these were the cause of his accident.

The defendant points out that there was no proof that a hazardous condition existed, that men had worked there all day, some 8 or 10 of them, that not one of them had fallen.

As to the damages, the defendants point out that the plaintiff could work as I have attempted to narrate, and that as a matter of mitigation of damages plaintiff has failed to attempt to work in the areas in which his physician said he might.

Now, so much for my resume of the testimony. Your own recollection obviously must prevail.

If I have mentioned certain things and not mentioned others, there was not an attempt on my part to either emphasize or minimize. It is your duty to consider all of the testimony, both direct and cross, for all of the witnesses,

(jkds 55)

and if perchance I have made any reference to the testimony with which you do not agree as having been the actual facts as presented, you are to have no hesitancy in disregarding my statement and relying on your own.

You, as I have said, time and time again, are the sole and exclusive judges of the facts. How do you determine the proof? How do you appraise the credibility of witnesses?

Well, you have to use your own good common sense. You saw these witnesses on the stand. You heard their statements. And you may ask yourselves how did the witness impress you? That means that you have to base your characterization of his testimony upon common sense.

You may also take into consideration the interest which a witness has. Obviously the plaintiff is an interested witness. He is the one who will profit most by a successful case. However, interested witnesses are not necessarily unworthy of belief. It is, however, one of the factors which

you must consider, and consequently you may examine his testimony nevertheless and give such weight and credibility to it as you think it warrants.

I speak briefly on medical testimony. You have heard two medical witnesses. Now, the opinion of a doctor or physician as to the condition of a patient may be based—may be based—entirely on objective symptoms revealed thru

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observation, examinations, tests or the opinion may be based entirely upon subjective, that is, mental observations by the plaintiff himself or statements by the plaintiff as to whether or not he feels pain.

To the extent that any opinion of a physician so testifying is based upon subjective statements to him by the patient, the jury may consider the trustworthiness of such statements by his patient in determining the weight to be given the physician's opinion.

The experts are asked to assume certain facts, and on the basis of those assumptions they give opinions. If you find from the evidence that such expert testimony has been based on an assumption of facts which are not established to your satisfaction you may give the opinion such weight as you think it deserves or you may disregard it completely.

Now, you came into the jury box in this case, I believe it was the middle of last week, at least, and any view by you, any facts about the case by you were, of course, not known at that time. What you know about the case at the present time should have been heard only from the witnesses or the exhibits submitted in this courtroom. Your final determination of the facts must be so based.

Each of you as you retire for your deliberations is expected to exchange views with your fellow jurors as

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you deliberate, and then you are expected to discuss and to consider the evidence, to listen to the arguments of your fellow jurors, to express your own opinion and come to a conclusion based upon the facts and reach an agreement solely on the evidence.

You are not to yield, however, simply because you are outnumbered. You should vote with the others only if you conclude that on the evidence and the law that it is the correct way to decide this case.

On the other hand, you should not hesitate, if you are convinced by a fellow juror, to change your point of view if you beleive it to have been erroneous.

To reach a verdict in this case it must be unanimous by all six.

Now, I say this to you in the light of the solemnity of the oath which you took at the beginning of this case. Both of these parties who are now before you—I respectfully refer to the plaintiff and the shipping company—are entitled to even-handed justice. They stand equally before you. Sympathy, bias, or prejudice play no part in your determination of this matter. The fact here that the plaintiff is an individual and that the defendant is a corporation must make no difference to you as you approach this case. Your duty is to decide this case fairly and

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impartially.

Upon request to the Court by a note in writing, signed

by your foreman, and if you believe it to be reasonably necessary, you may ask the Court to have any portion of the testimony read. You may also ask to examine any or all of the exhibits received in evidence.

I want to emphasize this, Mr. Foreman, that in sending any notes to the Court, at no time should you volunteer any information concerning your deliberations on a proposed verdict. In other words, you are not to tell me how you stand, for example.

I have prepared a special verdict. I ask the Clerk to give the original basic copy to the foreman and to give a copy to the other five jurors.

Mr. Foreman and members of the jury, I call your attention, particularly the foreman, to question No. 4 in which there is an insertion, so that 4[b] reads, I believe:

"If your answer to 4[a] is yes, to what award, if any, is plaintiff entitled for past lost wages", with a dollar sign.

And to question 6[b], another insertion—it is not made on the copies of the five—6[b], "If your answer to 6[a] is yes, to what award is plaintiff entitled therefor?"

And a similar insertion in 7[b] which will make

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it read, "If your answer to 7[a] is yes, to what award is plaintiff entitled therefor?"

All of the special verdict questions must be answered only after you consider or only in connection with your consideration of the instructions which I gave you during the course of this charge.

Now you are to retire to deliberate in secret. After you have returned your verdict—And you should agree on each answer, of course; you must agree.

Charge of the Court

After you have turned your verdict in, you will have completed your duties in this court on this case, and a'though I do not order it, I recommend that you do not answer any questions of any individual with respect to how you did it and what you did or what you thought or anything relative to your work here.

Now, the case is submitted to you, and I believe that each of you will live up to your oath of office.

Is there any exception? Mr. Lassoff?

Mr. Lassoff: Yes, your Honor.

The Court: I may as well excuse the alternate. You are excused. You may go. Get any papers or effects that you have in the jury room.

What is the instruction as to this juror?

The Clerk: He is to report back to room 109.

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The Court: At this time?

The Clerk: Yes.

The Court: Then go back to room 109. The other six who are to deliberate will remain in the jury box, and you are in charge of the deputy marshals who sit in the rear, the lady and the other one is there.

You will excuse me as you remain for further instruction.

[In the robing room]

The Court: All right, Mr. Lassoff.

Mr. Lassoff: Your Honor charged that as a necessity for the plaintiff to recover he would have to show that the defendant failed to warn or failed to correct the condition. I think you specifically took "failed to warn" out of this case—Mr. Kimball and mysel'—and he withdrew his request of charge on that basis.

The Court: I don't know. Did he? If you did——

Mr. Kimball: Excuse me, your Honor, your question is what?

The Court: Well, you heard Mr. Lassoff. He says that I charged, and I think I did—I think it is point 3 under negligence.

Mr. Kimball: Your Honor, I have no objection whatsoever if your Honor wishes to, in response to

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Mr. Lassoff's suggestion, go out there and tell this jury that there is no claim by the plaintiff that there was any failure to warn by the defendant. How that is going to help the plaintiff I don't know, but if that is what Mr. Lassoff wants, I don't object to it.

Mr. Lassoff: No, that is not exactly what I want. I want——

The Court: Well, what do you want?

Mr. Lassoff: All right. Withdraw that, your Honor.

Secondly, your Honor——

The Court: You withdraw this request.

Mr. Lassoff: I withdraw this request.

The Court: Do you want me to make that statement?

Mr. Lassoff: No, your Honor.

The Court: All right. What else is there?

Mr. Lassoff: Second, you gave the wrong amount in the medical stipulation, your Honor. The correct amount is $6,521.05. You charged——

The Court: What did I say?

Mr. Lassoff: 6,321.05

Mr. Kimball: I don't care about that. I don't want to accentuate that aspect of the case. I don't care what the jury brings in, whether they bring in 61 or 63.

The Court: Maybe counsel does. That is the point.

(jkds 62)

Mr. Lassoff: I do.

The Court: It is more. He says it is more. I don't recall.

Mr. Lassoff: I had it written down specifically as 6,521.05.

The Court: I have written down here—I think I may have erred some in the transcription. I have on my note 6,325, in the charge. I will make it 6,521. It is just a correction, that is all.

Anything else?

Mr. Lassoff: Yes, your Honor. I specifically object to your charge that if the condition complained of was caused solely by the plaintiff or his fellow longshoremen then the ship owner would not be responsible for negligence. It is my position that if that condition or lack of care existed for enough time so that constructive notice could be had of that condition the defendant ship owner would still be responsible for negligence.

Mr. Kimball: I think your Honor charged as close to verbatim of the Spano Case as you should, and I would think that your charge is entirely correct in light of the Spano decision.

The Court: I decline to charge.

Anything else?

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Mr. Lassoff: Your Honor also stated as a matter of fact two things: One, that nobody else had slipped that day. The testimony is they had slipped and slid all day; nobody else had fallen. In other areas you did say "fallen". The first time you used the word "slipped." Other

times you said "fallen". The first time you used it you just said "slipped".

Mr. Kimball: I don't think that there's enough of a misstatement there, if any, to justify emphasizing that aspect of the case by any correction, in view of the fact that your Honor not once, which is all that is required, but at least three or four times gave the cautionary instruction to this jury that no matter what you said by way of factual recitation it was their memory and solely their memory.

The Court: Yes, I don't think it is material.

Mr. Kimball: So that cleanses any error that you might have made, assuming arguendo, that you made any.

Mr. Lassoff: Your Honor also said that there was no proof of future pain and suffering.

The Court: I did not.

Mr. Lassoff: I heard it specifically, your Honor.

The Court: No, I didn't. I said that the proof of future pain and suffering, in general, must come from a

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physician who can prophesy or is competent. I did not say that there was no proof. That objection is overruled.

Mr. Lassoff: Do you want to go to other people's exceptions or do you want to go to my requests?

Mr. Kimball: I have no exceptions or requests.

Mr. Heidel: Nor do I, your Honor. I have no exceptions, no requests.

The Court: I don't go over requests again.

Mr. Lassoff: Your Honor has failed to charge some of my requests and I would like to make them on the record.

The Court: If you made them before they are applicable and they are on the record. If it is something new now,

you have to make it now. I am not going to go over your requests a second time. You had one shot at it.

Mr. Lassoff: Well, your Honor has refused except as charged to this request and I can only make the exception at this time.

I asked your Honor to charge that a longshoreman does not assume the risk of negligence of defendant ship owner or the unseaworthiness of the vessel. Assumption of risk is no defense in cases of accidents based on negligence or—

The Court: I think I have, in effect, charged that.

Mr. Kimball: It would be redundant, the more so

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because there never was any defense pleaded or claimed here of assumption of risk. The only affirmative defense pleaded or claimed was that of contributory negligence, as to which your Honor has given adequate charge.

The Court: That is my ruling.

Mr. Lassoff: Fine, your Honor.

One other thing, your Honor: In going over these special verdicts, your Honor skipped from 4[b] to 6[b]. There is under 5[b] also a blank to be filled out and under 5[c]——

The Court: Wait a minute. Let me look.

Mr. Kimball: No, your Honor, I think there is some misleading. You already have in your special verdict on the third sheet thereof the instructions which were inserted later in 5[b]. In other words, it is already typed in. "If your answer to 5[a] is yes, then go on to [b] and [c]", otherwise don't.

The Court: It is clear.

Mr. Lassoff: All right.

The Court: All right, let's go.

[In open court]

Charge of the Court

The Court: I believe I made an arithmetical mistake in reference to the stipulation relative to the physician's expenses or the expenses for a physician.

(jkds 65A)

$6,521 is correct, is it not, instead of what I said? I think I said 63. In any event, it is $6,521.

Now you may retire. You are in charge of the deputy marshals.

[Jury retired at 3:15 o'clock p.m.]

Court Exhibit 5, Related Colloquy and Charge

* * *

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(In the robing room.)

The Court: I will read the note which I will ask the clerk to mark as a Court's exhibit.

"Please clarify, are we to decide if the accident occurred as described by Mr. Fucci or are we to assume that the accident did occur and then merely decide if the defendant is responsible for the assumed accident?"

This almost requires a repetition of the charge. I think I should say something like this:

It is for you to determine whether the accident did occur as described by Mr. Fucci, and then you are to decide if the defendant was responsible either by negligence or by unseaworthiness for the said accident.

Do you agree with that, Mr. Lassoff?

Mr. Lassoff: Yes, your Honor.

The Court: Mr. Kimball.

Mr. Kimball: Yes, your Honor, pointing out to them that if they are not persuaded that the accident did occur in the manner described by the plaintiff, then that is the end of the case, and they are obliged to bring in a verdict for the defendant.

The Court: I shall enlighten them on that.

Mr. Lassoff: I object to that.

The Court: They will proceed with the statement

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as given in the special verdict.

Mr. Lassoff: Right.

The Court: And that includes everything.

Mr. Lassoff: That I won't object to.

The Court: But I'm going to say what I just said. In fact, I will have the reporter read what I said in order that there may be no variation.

Let's go.

(In open court, jury present.)

The Court: Members of the jury, I received your note which reads:

"Please clarify, are we to decide if the accident occurred as described by Mr. Fucci or are we to assume that the accident did occur and then merely decide if the defendant is responsible for the assumed accident?"

Well, I dictated something to the reporter and I will ask him to read it, then I will supplement.

(Reporter read to the jury.)

Court Exhibit 5, Related Colloquy and Charge

The Court: Yes. Have you the special verdict here, any of you? If not, let me read to you the first question, and that was as follows:

"Has plaintiff proved by a fair preponderance of the credible evidence that defendant was negligent in any respect due to the presence of seeds on the deck of

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the S.S. Musi Lloyd as the same existed on July 10, 1972" —that is the first thing you have to decide—"and that such negligence was a proximate cause in whole or in part of an accident which plaintiff claims to have sustained on July 10, 1970?"

"Answer yes or no."

Then you proceed to Question 2, and you decide the same thing with respect to unseaworthiness. The instructions, I believe are clear.

You are not to assume that an accident occurred as described by Mr. Fucci. It is the burden of the plaintiff to prove that that did take place.

That's all. Now go back and see if you can determine these matters.

(At 11:00 a.m., the jury retired to continue their deliberations.)

(Note from the jury marked Court's Exhibit 5.)

(In open court, jury present.)

The Court: Call the roll.

(Roll call taken, all jurors present.)

The Clerk: Mr. Foreman, have the jurors agreed upon a verdict?

The Foreman: Yes, we have.

Verdict

The Clerk: How do you find to Question No. 1?

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The Foreman: No.

The Clerk: How do you find to Question No. 2?

The Foreman: No.

The Court: That is all that is necessary.

Will you get the special verdict and let the Court have it?

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say to Question No. 1, no, and to Question No. 2, no, and so say you all.

(Affirmative response.)

The Court: Poll the jury.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you find to Question No. 1, no; to Question No. 2, no.

(Each juror, upon being asked by the Clerk, "Is that your verdict?" answered in the affirmative.)

The Clerk: The jury is polled, your Honor.

The Court: Very well. The jurors are excused with the thanks of the Court for rendering a verdict in this case and listening to this case, and the instructions are what now, Mr. Clerk?

The Clerk: They are to return to Room 109, your Honor.

The Court: You may go now to 109. Thank you.

Special Verdict Re Liability and Damages

1. Has plaintiff proved by a fair preponderance of the credible evidence that defendant was negligent in any respect due to the presence of seeds on the deck of the hold S.S. Musi Lloyd as the same existed on July 10, 1970 and that such negligence was a proximate cause, in whole or in part, of an accident which plaintiff claims to have sustained on July 10, 1970?

	✓
Yes	No

Proceed to question 2.

2. Has plaintiff proved by a fair preponderance of the credible evidence that the S.S. Musi Lloyd was unseaworthy in any respect due to the presence of seeds on the deck of the S.S. Musi Lloyd as the same existed on July 10, 1970 and that such unseaworthiness was a proximate cause, in whole or in part, of an accident which plaintiff claims to have sustained on July 10, 1970?

	✓
Yes	No

If your answer to either question 1 or 2 is "Yes," proceed to question 3(a).

If your answer to both questions 1 and 2 are "No," omit all further questions and sign the Special Verdict on the last page.

3. (a) Has defendant proved by a fair preponderance of the credible evidence that negligence on the part of plaintiff contributed, in whole or in part, to an accident sustained by plaintiff on board the S.S. Musi Lloyd on July 10, 1970?

Yes	No

If your answer to question 3(a) is "No," omit question 3(b) and proceed to question 4.

Special Verdict Re Liability and Damages

3. (b) If your answer to question 3(a) is "Yes," to what extent did plaintiff's own negligence contribute to his accident? (Express in terms of a percentage)

_____%

Proceed to question 4.

4. (a) Has plaintiff proved by a fair preponderance of the credible evidence that as a result of the accident of July 10, 1970 he sustained damages consisting of past loss of wages?

_____ Yes _____ No

4. (b) To what award, if any, is plaintiff entitled for past loss of wages?

$_____

Proceed to question 5.

5. (a) Has plaintiff proved by a fair preponderance of the credible evidence that as a result of the accident of July 10, 1970 he is reasonably certain to sustain damages consisting of future lost wages?

_____ Yes _____ No

If your answer to question 5(a) is "Yes," answer 5(b) and 5(c).

If your answer to question 5(a) is "No," omit 5(b) and 5(c) and proceed to question 6.

5. (b) What is the amount of the average annual loss of future wages as a result of the accident of July 10, 1970?

$_____ per annum

Special Verdict Re Liability and Damages

5. (c) What is the number of years in the future during which this average annual loss of future wages will continue as a result of the accident of July 10, 1970?

_____ years

6. (a) Has plaintiff proved by a fair preponderance of the credible evidence that as a result of the accident of July 10, 1970 he sustained damages consisting of past pain, suffering and disability?

_____ Yes _____ No

6. (b) To what award is plaintiff entitled therefor?

$_____

Proceed to question 7(a).

7. (a) Has plaintiff proved by a fair preponderance of the credible evidence that as a result of the accident of July 10, 1970 he is reasonably certain to sustain damages consisting of future pain, suffering and disability?

_____ Yes _____ No

7. (b) To what award is plaintiff entitled therefor?

$_____

Proceed to question 8.

8. (a) Has plaintiff proved by a fair preponderance of the credible evidence that as a proximate result of the accident of July 10, 1970, he sustained damages consisting of past medical expenses?

_____ Yes _____ No

(b) To what award, if any, is plaintiff entitled therefor?

$_____

SIGN THE SPECIAL VERDICT ON THE LAST PAGE

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